

FEDERAL MAGISTRATES COURT OF AUSTRALIA

BUI v MINISTER FOR IMMIGRATION & ANOR

[2009] FMCA 1096

MIGRATION – MRT decision – prospective spouse off-shore visa – whether couple genuinely intend to live together as spouses – Tribunal disbelieved visa applicant and sponsor – rationality and adequacy of reasons – no apprehension of bias established – whether consideration of best interests of child – reference to definition of spouse – no jurisdictional error established – application dismissed.

Migration Act 1958 (Cth)

Migration Regulations 1994 (Cth), rr.1.15A, Sch.2 cl. 300.214, 300.215, 300.216, 300.221, 801.221(2)

Minister for Immigration & Ethnic Affairs v Teoh (1995) 183 CLR 273

Minister for Immigration & Citizenship v Yucesan (2008) 169 FCR 202

Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323

NADH v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 214 ALR 264

Pham v Minister for Immigration [2009] FMCA 287

Re Minister for Immigration & Multicultural & Indigenous Affairs, ex parte Lam (2003) 214 CLR 1

Re Refugee Review Tribunal; Ex parte H (2001) 179 ALR 425

WAEF v Minister for Immigration (2003) 75 ALD 630

Applicant: THI VAN ANH BUI

First Respondent: MINISTER FOR IMMIGRATION & CITIZENSHIP

Second Respondent: MIGRATION REVIEW TRIBUNAL

File Number: SYG 1392 of 2009

Judgment of: Smith FM

Hearing date: 3 November 2009

Delivered at: Sydney

Delivered on: 18 November 2009

REPRESENTATION

Counsel for the Applicant: Mr R Turner

Solicitors for the Applicant: Turner Coulson Immigration Lawyers

Counsel for the Respondents: Mr J Knackstredt

Solicitors for the Respondents: Clayton Utz

ORDERS

- (1) The application is dismissed.
- (2) The applicant must pay the first respondent's costs in the sum of \$5,865.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
SYDNEY**

SYG 1392 of 2009

THI VAN ANH BUI
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. Ms Bui is a naturalised Australian citizen, who sponsored an application by Mr Ta for a “Prospective Marriage” (Temporary) (Class TO, subclass 300) visa. The application was made to the Immigration Department’s office in Hanoi by an Australian solicitor on 22 August 2007. It was refused by a delegate in that office on 29 October 2007, after he interviewed Mr Ta. Ms Bui was assisted by the solicitor to appeal, and she attended a hearing of the Tribunal which also took evidence from Mr Ta and Ms Bui’s friend Ms Pham. The Tribunal, like the delegate but for different reasons, disbelieved their evidence that they genuinely intended to marry and live in Australia as spouses. It affirmed the delegate’s decision on 21 May 2009.
2. I am now asked to set aside the Tribunal’s decision, and to remit the matter for further consideration. I have power to do this only if the

Tribunal's decision was affected by jurisdictional error, and I have no power to decide for myself whether the evidence of Ms Bui and Mr Ta should have been accepted, nor whether Mr Ta should be given permission to enter Australia.

3. Subclass 300 is a temporary visa granted to an offshore visa applicant, which enables them to travel to Australia to enter into a proposed marriage. The visa lasts for up to nine months before it expires, and it is anticipated that most visa holders within that time will marry and then apply for a permanent residence spouse visa. That visa is normally not granted until two years after the onshore application for a spouse visa.
4. The significant criterion upon which both the delegate and the Tribunal were not satisfied as to Mr Ta's eligibility, was the criterion in Sch.2 cl.300.216 of the *Migration Regulations 1994* (Cth) that:

The Minister is satisfied that the parties genuinely intend to live together as spouses.

5. This criterion is a time of application criterion, as well as having to be satisfied at time of decision (see cl.300.221).
6. Other criteria at time of application require that the visa applicant has an intention to marry an Australian citizen or a permanent resident or an eligible New Zealand citizen, that there is no prohibited circumstance, that the prospective spouse meets sponsorship requirements, and that the parties have "*met and are known to each other personally*" (see cl.300.214 and note *Minister for Immigration & Citizenship v Yucesan* (2008) 169 FCR 202). Also, under cl.300.215:

300.215 *The applicant establishes:*

- (a) *that the parties genuinely intend to marry; and*
- (b) *that the marriage is intended by the parties to take place within the visa period.*

The applicant's evidence

7. In her written statements, Ms Bui said that she first met Mr Ta in January 2005, during a three month visit to her family in Vietnam by

her and her infant son. She said that their meeting occurred because her employer at a Cabramatta restaurant asked her to take a present to the family of Mr Ngoc Oanh Ta, who was the fiancé of the niece of her employer. She then met this person's brother, Mr Ta, and they went out together. When she returned to Australia Mr Ta '*saw me off at the airport*', and later he wrote to her. She again travelled to Vietnam in November 2006, and in January 2007 she went to meet Mr Ta's parents and stayed in his home. They later travelled together in Vietnam, and she agreed '*to go further in our relationship*' in February 2007. An engagement celebration was held at her parent's home in April, and she visited his relations. She returned to Australia in May 2007, and they continued contact by letters and phone. Evidence of their contacts was provided, and some photographs of events in Vietnam. They presented evidence that they had booked a marriage celebrant, and said that they intended to marry in January 2008.

8. In the visa application, Ms Bui gave her home address as a home unit at Cabramatta, and she said that she was receiving parenting payments in relation to her son James. His birth certificate was presented to the Tribunal at its request. This showed that he was born in January 2003 at a Liverpool hospital, that no father was recorded, and that the informant, Ms Bui, gave the Cabramatta home unit as her address in November 2003. In her statements to the Department, Ms Bui said that he was conceived in a casual encounter during a visit to Vietnam. She did not inform the delegate nor the Tribunal until it was put to her by the Tribunal, that the Cabramatta home unit had been owned since August 2003 by Mr Ta's brother, Mr Ngoc Oanh Ta, nor that she had travelled with this person from Vietnam in April 2005. When questioned, she claimed that the home unit was only her mailing address in 2003, that she later resided there with her friend Ms Pham, that Mr Ngoc Oanh Ta was only their landlord, that she was unaware that they had travelled on the same plane and had presented together at Customs in 2005, and that she did not know him before they first met in Vietnam in March 2007 after her engagement to Mr Ta. Statements by Mr Ngoc Oanh Ta and Ms Pham's husband were presented to corroborate these claims, but no contemporaneous documentation of the claimed tenancy arrangements was provided. The evidence suggested that Mr Ngoc Oanh Ta was himself attempting to sponsor a fiancé or spouse from Vietnam.

9. The delegate's reasons for not being satisfied that Mr Ta had a genuine intention to live as the spouse of Ms Bui were that, on interview, he did not have a good knowledge of her, that minimal evidence had been presented to demonstrate that they shared social activities and were recognised socially as a couple who were engaged to be married, and that Mr Ta – a professional photographer – had presented some photographs which had been '*digitally manipulated to include the applicant in them*'. A partial record of the interview (see Court Book Book p.206) noted that one picture showed '*the sun shining on him but no others who were standing very close to him, and his hand was floating over the SPs shoulder but not touching it. Various other photos and inconsistencies*'.
10. This reasoning of the delegate was not pursued by the Tribunal, either in its investigations or its reasons for affirming the decision. No ground of review is argued in relation to this. However, I note that it must have been clear to Ms Bui and her solicitor from the delegate's statement of reasons, as well as from the Tribunal's subsequent questioning and correspondence, that the credibility of all her evidence to show that she and Mr Ta genuinely intended to marry was in issue in the review by the Tribunal.

The Tribunal's reasons

11. In its statement of reasons, the Tribunal's key reason was stated at three points:

[50] I find that that the visa applicant and the review applicant are not witnesses of truth. I am satisfied they have created their claims in order to obtain the visa sought.

...

[64] I am satisfied on the information before me that the visa applicant and the review applicant are not witnesses of truth. I am satisfied they have tailored their evidence to obtain the visa sought.

...

[71] In light of my finding that the review applicant and the visa applicant are not witnesses of truth, I am satisfied that the

engagement and the intended wedding have been contrived in order to obtain the visa sought.

[72] I find that the visa applicant and the review applicant did not have a genuine intention to marry and reside together as husband and wife at the date of application. I find that at the time of application the visa applicant and the review applicant did not genuinely intend to live together as spouses and I find that the visa applicant does not meet cl.300.216.

12. Between these conclusions as to the lack of general credibility of Ms Bui and Mr Ta, and implicitly also their witnesses, the Tribunal detailed a number of concerns to explain its conclusions. It presented four key findings. Omitting its reasoning, these were:

- i) The Tribunal was satisfied that Ms Bui had lived in Mr Ngoc Oanh Ta's home unit since about November 2003, and it rejected her claim that they first met after her claimed engagement to his brother in 2007 (see [51] to [56]).
- ii) Ms Bui's explanation about her travelling alone back to Australia in 2005 was '*an invention made in order to obtain the visa sought*' (see [57]-[59]).
- iii) Ms Bui's evidence that she first met Mr Ta's family in January 2007, was inconsistent with Mr Ta's evidence to it that '*the meeting occurred after the review applicant arrived in Vietnam in November 2006*' (see [60]-[61]). The Tribunal said:

I am of the view that had the visa applicant intended to inform the Tribunal that the review applicant met his parents in January 2007 for the first time when the review applicant travelled to his home he would have informed the Tribunal at the Tribunal hearing.

- iv) The applicant's social security income and bank records did not support her claim that she could pay for travel by two persons in 2008 (see [62]-[63]). The Tribunal said:

I am not satisfied that the review applicant paid for her travel to Vietnam, as claimed. I am not satisfied that the review applicant has disclosed her true financial

position to the Tribunal and details about payment of her fares to and from Vietnam.

13. After making the above points to explain why the Tribunal disbelieved the claims of Ms Bui and Mr Ta and found that they did not have the intention required by cl.300.216 at the date of application, the Tribunal included a discussion of the definition of ‘spouse’ which was then found in Migration Regulation 1.15A (subsequent amendments now split the definition between that regulation and a new s.5F of the Migration Act). The Tribunal said:

[64] I am satisfied on the information before me that the visa applicant and the review applicant are not witnesses of truth. I am satisfied they have tailored their evidence to obtain the visa sought.

[65] Clause 300.216 requires that at the time of application the ‘the parties genuinely intend to live together as spouses’. The considerations for a spousal relationship set out in r.1.15A of the Regulations. The term ‘spouse’ is defined in r. 1.15A as requiring a genuine and continuing relationship between the parties with a ‘mutual commitment to a shared life as husband and wife to the exclusion of all others’ within the test incorporated within r.1.15A.

[66] The mandatory aspect of r.1.15A(3) does not apply to Subclass 300 visa applications and PAM3 policy provides that the r.1.15A should be applied only in so far as it is applicable.

[67] Regulation 1.15A(3)(a) deals with the financial aspects of the relationship. There is no joint ownership of real estate or other major assets or any joint liabilities. There is no pooling of financial resources and neither party to the relationship owes any legal obligation in respect of the other. The couple do not live together and there is no sharing of day-to-day household expenses. There are no major financial commitments. Other than gifts the review applicant and the visa applicant did not have joint finances. As stated above I am not satisfied that the review applicant has disclosed to the Tribunal details of payments made for her travel to Vietnam.

[68] Regulation 1.15A(3)(b) focuses on the nature of the household. The couple do not live together in Australia and claim that they resided together in Vietnam. A friend attests

to the genuineness of the relationship. The review applicant claims they shared household responsibilities.

[69] Regulation 1.15A(3)(c) looks at the social aspects of the relationship. The review applicant claims they have held themselves out as an engaged couple, they resided together and shared plans to undertake joint social activities and have the support of friends and family.

[70] Regulation 1.15A(3)(d) looks at the nature of the parties' commitment to each other. The review applicant claims there is a genuine commitment to each other. The review applicant has provided photographs, telephone accounts and declarations from friends and relatives all attesting to their commitment to each other.

The grounds of review

14. Ms Bui's current solicitor relied upon the following grounds in her application for review. The other grounds were abandoned.

1. The Second Respondent's decision is affected by apprehended bias.

Particulars

a. The Tribunal set about its task by looking for reasons to reject the application

(i) the Tribunal found evidence to be inconsistent when it was not inconsistent.

(ii) the Tribunal rejected sworn/affirmed evidence because there was no "independent evidence" to support it in circumstances where there would ordinarily be no such evidence available

i. relied upon evidence said by it to only "to obtain the visa sought" when the evidence was not relevant to an application for the visa sought and could not affect the decision.

2. The Tribunal failed to provide the Applicant procedural fairness.

Particulars

- a. *A child's interests were affected by the application and were made known to the Tribunal, paras 22, 24.*
 - b. *The Tribunal failed to consider, or take account of, the best interests of that child.*
 - c. *The Tribunal failed to advise the Applicant that it would not be treating the best interests of that child as a primary criteria.*
3. *The Tribunal took account of irrelevant considerations.*

Particulars

- a.
- b. *Regulation 1.15A which has no application to Prospective Marriage Subclass 300 visa applications.*

Ground 1

15. In submissions in support of ground 1, it was conceded that there was no evidence arising from the conduct of the hearing by the Tribunal, nor in any of its procedures prior to making its decision, to support an apprehension that the Tribunal might not have assessed all the evidence with an open mind in relation to the issues in the proceeding. However, it was submitted that the Tribunal's reasons, or some of them, for arriving at an adverse conclusion in relation to the marital intentions of Ms Bui and Mr Ta, and for rejecting their credibility entirely, were so inadequate as to satisfy the test of "*whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question to be decided*" (see *Re Refugee Review Tribunal; Ex parte H* (2001) 179 ALR 425 at [27]-[32])
16. However, it was the Tribunal's statutory duty to make a decision on the issues of credibility and intention raised by cl.300.216 in the present case, and, having decided against the applicant, to provide a statement explaining its reasons for doing so. The hypothetical lay observer is aware of this, and would normally conclude no more from any inadequacies in the statement of reasons, than that the decision was wrong or unpersuasive in its discussion of fact or law. To establish a ground of apprehended bias normally requires some indication in the

proceedings prior to decision that the Tribunal may have approached its decision with a closed or pre-determined mind, such as was found in *NADH v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 214 ALR 264. Confirmation of such a concern may then be found in the inadequacies of a statement of reasons. For this reason, the common complaint to this Court that ‘the Tribunal had bias against me’, based merely upon its rejection of the credibility of an applicant, falls far short of establishing jurisdictional error on the ground of apprehended bias.

17. In my opinion, the arguments to establish an apprehension of bias in the present case, similarly fell far short of doing so. Essentially, they were no more than an attack on the Tribunal’s reasoning in relation to some of its points, which invited me to enter into a merits review of its findings.
18. Ms Bui’s solicitor criticised the Tribunal’s rejection of her evidence that it was sheer coincidence that she and Mr Ngoc Oanh Ta had travelled back from Vietnam on the same plane and been “*timed at Australian customs together*”, and its related finding which rejected her evidence that their relationship prior to 2007 was solely that of unknown landlord and sub-tenant. He argued that it was unreasonable for the Tribunal to expect tenancy and other ‘independent verifiable information’ in relation to either Ms Bui or Ms Pham’s occupation of the home unit. He attempted to characterise as unreasonable or irrational the importance given by the Tribunal to Ms Bui’s unsatisfactory evidence about her association with Mr Ngoc Oanh Ta, and submitted that there could be no conceivable reason why she would want to hide or misrepresent the nature of it in the course of his brother’s visa application. At least, there would not be any reason having a logical bearing on Ms Bui’s matrimonial intentions in relation to his brother in Vietnam. I was invited to conclude that the Tribunal had made irrational and irrelevant findings about Ms Bui’s evidence concerning her association with Mr Ngoc Oanh Ta, and had applied them as its principal grounds for the wholesale rejection of her claims about her relationship with Mr Ta. The explanation for the Tribunal adopting such reasoning was that it had closed its mind prematurely to a proper assessment of all the evidence.

19. I have difficulty with this characterisation of the Tribunal's reasoning about Ms Bui's evidence concerning her association with Mr Ngoc Oanh Ta, as well as with the further leap to a reasonable apprehension of bias by predetermination. The Tribunal's reasoning might have been better expressed, and might have been more satisfying to a reader if the Tribunal had felt able to make clear findings as to what it thought was the true association between Ms Bui and Mr Ngoc Oanh Ta, why Ms Bui had attempted to deny the association, and how Ms Bui's evasions undermined the claimed marital intentions of Ms Bui with Mr Ta. However, a statement of reasons is not to be picked apart with an eye looking for jurisdictional error.
20. In my opinion, it was not irrational for the Tribunal to draw some strength for its disbelief of the claims central to the visa application, from the complete absence of 'verifiable' evidence that Ms Bui was occupying her home unit only as a sub-tenant or co-tenant of Mr Ta's brother. It is understandable that, having found Ms Bui's evidence about her association with Mr Ta's brother to have been untrue and "*an invention in order to obtain the visa sought*", the Tribunal was unable to make findings on what their true association was, and what were the motives which led her to attempting to conceal it when sponsoring Mr Ta. It was not, in my opinion, necessary in law that such findings should be made. I consider that it was rational, and open on the evidence, for the Tribunal to arrive at a conclusion adverse to Ms Bui's veracity in relation to a matter which, in the objectively established circumstances, had a potentially direct bearing on its acceptance of her claim to intend to marry Mr Ngoc Oanh Ta's Vietnamese brother. In my opinion, it was not unreasonable nor irrational for the Tribunal to give these unsatisfactory aspects of her evidence significance in support of its adverse conclusions drawn at paragraphs [71] and [72].
21. A similar argument of irrationality was developed in relation to the Tribunal's finding of inconsistency between the evidence of Ms Bui and Mr Ta as to when she first met his family in Vietnam. It was submitted that it was not open to the Tribunal to have found his evidence to have been inconsistent with that of Ms Bui. A transcript of his evidence given to the Tribunal was not in evidence, but I was referred to the Tribunal's description of it:

[36] I asked the visa applicant when his family met her family. He said that it was at the end of March. The review applicant met his parents after she arrived in November 2006. She later went and stayed at their home at the time of the birthday of her son in January 2007. The visa applicant said that his brother had been at the parent's home for 2 days but he went back to the south. His brother was not present at the birthday party.

22. It was submitted that it was not open to the Tribunal to have concluded from Mr Ta's reference to '*after she arrived in November 2006*' that he meant 'soon after' or a time more proximate than January 2007.
23. However, I do not have in evidence the exact words used by Mr Ta, as translated in the course of the hearing. Nor do I have the benefit of having heard that evidence in the context of the whole hearing. Notwithstanding that his evidence was taken by telephone, it may well have been open to the Tribunal to have drawn the inference that Mr Ta gave evidence implying a time of first meeting prior to January 2007. I am also not satisfied that there was no evidence given in the course of the hearing which allowed the Tribunal to have expected him to have given evidence that the meeting did not occur until January 2007, if that was the case. I therefore am not satisfied as to the evidentiary foundations for the argument addressed at the point drawn by the Tribunal at paragraphs [61]-[62].
24. Moreover, this was the Tribunal's 'third' point in support of its adverse opinion on the credibility of Mr Ta and Ms Bui's claims to genuinely intend to marry and live together in Australia as spouses. It appears to me to be a relatively minor point, and even if it was wrongly drawn, I do not consider that it lends support to a conclusion that the Tribunal had prematurely determined the matter regardless of the evidence before it.
25. I therefore am not persuaded by the submissions presented in support of ground 1, to find that the Tribunal's decision was vitiated upon principles of apprehended bias.

Ground 2

26. The second ground was poorly developed, both in relation to evidence and legal authority. I had difficulty understanding how a consideration of ‘*the best interests of a child*’ could have legal or factual bearing on the Tribunal’s application of the criterion in cl.300.216. Prima facie, the determination whether there exists in two adults an intention to marry and live together as spouses does not involve consideration of the best interests of a child of one of them, although the outcome of that determination might affect the future life of the child for better or worse. However, I accept that it is conceivable that proof of the existence of the relevant intention might be assisted by evidence of a relationship between the prospective spouse and the child which is probative of the likelihood of the adults wishing to marry and live together. In such a case, there might be coincidence of the adults’ intention and what might appear to be the best interests of the child, and the evidence might be relevant to the decision-maker’s consideration of cl.300.216.
27. Ms Bui’s solicitor did not elaborate the legal foundations of this ground, nor take me to any authorities. In oral submissions he disclaimed the framing of the ground in terms of legitimate expectation and procedural fairness. I therefore do not consider it necessary to examine the reasoning in *Minister for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273 and the extent to which it has the current support of the High Court (cf. *Re Minister for Immigration & Multicultural & Indigenous Affairs, ex parte Lam* (2003) 214 CLR 1).
28. Ms Bui’s solicitor’s oral submissions identified the source of the present Tribunal’s obligation to consider the child’s interests as a relevant consideration under cl.300.216 in the claims and evidence presented to the Tribunal by Ms Bui. In effect, I understood him to be arguing that the Tribunal failed to address a claim made by Ms Bui. It was, in effect, submitted that she had claimed to believe that her marriage to Mr Ta would be in the best interests of her son, based on the interactions of Mr Ta with her son, and had claimed that the Tribunal could be satisfied in terms of cl.300.216 if it accepted that those interactions had occurred and that she had that belief.

29. Whether such a claim was, in fact, made in the evidence before the Tribunal is not at all clear. Ms Bui's statements in support of the visa application made reference to her son travelling with her in her visits to Vietnam, and to his meeting Mr Ta. However, I was referred only to one reference by the Tribunal to Ms Bui's evidence at the hearing, in support of the contention that she had claimed that they had developed, or were developing and would develop, a parental relationship which was probative of the claimed marital intentions of Ms Bui and Mr Ta. The Tribunal said at paragraph [22]:

I asked the review applicant about her son. She said that the visa applicant was very good to him. Her son called him 'uncle'. He bought her son various toys, including an aircraft and a train.

30. This provides very slight foundation for arguing that the Tribunal was bound expressly to consider whether there was evidence of a developing parental relationship between Mr Ta and Ms Bui's son which was evidentiary of their intention to marry. Given the insignificance of the evidence in the context of the whole of the evidence, I would be slow to infer from the absence of express discussion of it in the Tribunal's 'findings and reasons' that it was overlooked or put out of consideration (cf. *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [10], [35], [69], [75]).
31. Moreover, I accept the submission of the Minister that the short answer to this ground is that the Tribunal's adverse findings about Ms Bui's credibility carried with it a refusal to accept the suggested factual claim in relation to the son's relationship with Mr Ta. The rejection of that claim, if it was made, was 'subsumed' in the Tribunal's more general reasons (cf. *WAEF v Minister for Immigration* (2003) 75 ALD 630 at [47], and *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [91]).
32. For all the above reasons, I am not persuaded that any jurisdictional error has been established by the submissions made to me by reference to ground 2.

Ground 3

33. Ground 3 requires examination of the paragraphs in the Tribunal's reasons, extracted above, where it referred to the matters which are prescribed in r.1.15A(3) as non-mandatory considerations when applying the definition of 'spouse' in relation to non-prescribed visas. It was submitted that this definition had no application to a visa criterion which did not address the current or past existence of a spouse relationship, but required the Minister to be satisfied as to a present intention to 'live together as spouses' in the future. In particular, the irrelevance of the definition to that assessment was shown by the use throughout the definition of the present tense in relation to the indicia of a spouse relationship. The Tribunal therefore had made an error of law in thinking that its application of cl.300.216 could be guided by the matters listed in reg.1.15A(3). By taking its findings on these irrelevant matters into account the Tribunal had made a jurisdictional error.
34. In *Pham v Minister for Immigration* [2009] FMCA 287 at [12]-14] I identified, but was not required to resolve, doubts whether the definition of spouse was directly or indirectly relevant to a determination under cl.300.216. As will appear, I again do not need to resolve this issue in the present case.
35. I remain of the opinion, as was conceded by the applicant's counsel in *Pham*, that in some circumstances a discussion of the indicia in reg.1.15A would assist the discovery of current intentions about future cohabitation as spouses, even if the definition is not directly invoked by the words 'intend to live together as spouses'. For example, in a case where a couple claim that they have commenced cohabitation overseas in an un-formalised marital relationship in anticipation of the grant of a 'prospective marriage' visa, it may be very pertinent to test their claims against the matters in reg.1.15A, even if the legislation does not directly require this.
36. However, I accept that in a case where the couple make no such claim, and present their relationship purely as that of an engagement to marry and cohabit in the future, it could be potentially misleading for a decision-maker to examine their current or past circumstances against the matters listed in reg.1.15A. Jurisdictional error might appear, if the decision-maker found against the couple because they did not currently

or in the past demonstrate a relationship with the characteristics suggested by reg.1.15A.

37. Although the present Tribunal's discussion and findings referring to reg.1.15A(3) have some obscurity as to how the Tribunal thought that its findings related to the application of cl.300.216, I am not persuaded that they demonstrate the jurisdictional error which I have described above. At [66] the Tribunal correctly, in my opinion, suggested that it was not bound to address the r.1.15A matters unless they were 'applicable'. This suggests that it was alive to the fact that these matters could only be relevant in so far as they might illuminate a current intention about future cohabitation. Its findings that there was no past or current sharing of finances, a household, or social activities, do not necessarily indicate that the Tribunal thought that favourable findings were required on these matters, nor even that its findings on the matters were of any particular relevance to its ultimate decision. In a sense, these findings did no more than confirm uncontroversial parts of the claims made by Ms Bui and Mr Ta, and referring to them might appear to do no more than indicate that the Tribunal was unable to find assistance for their case from evidence of current cohabitation when deciding about their future intentions. If this was all that was intended to be drawn by the Tribunal from the findings, then they do not reveal jurisdictional error.
38. This reading of the Tribunal's reasons is confirmed by the context in which the Tribunal included its brief discussion of reg.1.15A(3) and its indicia. It comes at the end of reasons which explain why the Tribunal rejected the credibility of Ms Bui and Mr Ta in relation to their claimed intention to marry. The earlier reasons clearly addressed the claims and evidence before it, and were not based upon any implicit requirement that reg.1.15A(3) matters needed to be demonstrated. The paragraphs which are attacked under this ground were inserted at the end of the reasons, and the Tribunal then stated its dissatisfaction under cl.300.216 in paragraphs [71] to [73] without reference to them, but with reference to its antecedent findings and reasoning. I therefore would not read the Tribunal's inconclusive findings referring to reg.1.15A(3) as providing, or forming part of, its reasons for its conclusion that Mr Ta did not meet cl.300.216.

39. I am therefore not persuaded that the Tribunal made any material jurisdictional error in its reasons which referred to reg.1.15A(3).
40. Since I have found against all the grounds of review which were relied upon before me, I must dismiss the application. A consequential costs order is agreed.

I certify that the preceding thirty-eight (38) paragraphs are a true copy of the reasons for judgment of Smith FM

Associate: Michael Abood

Date: 18 November 2009